◦ THE HON'BLE SRI JUSTICE BILAL NAZKI

–

AND

–

THE HON'BLE SRI JUSTICE K.C.BHANU

–

+ WA Nos. 1360, 1390 & 1395 of 2005

% Dated 28.1.2006

GVPREL-MEE (JV), Hyderabad represented by its General Power of Attorney Holder Sri G.Siva Sankar Reddy

…Appellant

Vs.

$ The Government of Andhra Pradesh represented by the Principal Secretary to Irrigation and Command Area Development Department, and another

…Respondents

! Counsel for appellants: Mr. P. Kamlakar, Mr. B. Adinarayana Rao and Mr. O. Manohar Reddy

^Counsel for Respondents: G.P. for Irrigation and Command Area Development,

<GIST:

> HEAD NOTE:

? Cases referred

1. 2003 (1) ALD 336;
2. 2004 (1) ALD 783
3. (1995) 1 SCC 478

HON'BLE MR. JUSTICE BILAL NAZKI

AND

HON'BLE MR. JUSTICE K.C.BHANU

W.A.NOs. 1360, 1390 & 1395 OF 2005

Dt. 28.1.2006

Between:

GVPREL-MEE (JV), Hyderabad represented by its General Power of Attorney Holder Sri G.Siva Sankar Reddy

…Appellant

and

The Government of Andhra Pradesh represented by the Principal Secretary to Irrigation and Command Area Development Department, and another

…Respondents

HON'BLE MR. JUSTICE BILAL NAZKI

AND

HON'BLE MR. JUSTICE K.C.BHANU

W.A.NOs. 1360, 1390 & 1395 OF 2005

COMMON JUDGMENT: (Per Hon'ble Mr. Justice Bilal Nazki)

The Government of Andhra Pradesh decided to improve the irrigation facilities in the State and therefore took up medium size projects. All these projects had to be completed within a period of five years. The Government also proposed to divide various works into convenient packages so as to invite tenders for Engineering, Procurement and Construction (EPC) on turn key system including investigation, design, preparation of construction of projects, cost estimates, construction, maintenance and operation for one irrigation system. The Government also decided to take up the tender process in two stages. In the first stage it would empanel a specified number of special class civil contractors by inviting offers for pre-qualification to tender for the projects and in the second stage it proposed to invite tenders from empanelled concerns/firms/companies to take up water resources projects on EPC turn key basis. After the tenders were received, the bids had to be verified by high power committee appointed by the Government.

The grievance of the petitioner in WP No. 11391 of 2005 (Appellant in WA No. 1360 of 2005) was that he was empanelled, he submitted his tender for packages 90, 91 and 98 and he was found to

be lowest tenderer-L1. However, the respondents were not entering into an agreement with him, therefore he sought a direction that the respondents may be directed to enter into an agreement with him with respect to packages 90, 91 and 98.

While disposing of the writ petition, the learned single Judge, ordered for fresh tender because he found the writ petitioner to be not eligible and he also found that if the works were allotted to the persons who had offered the next best rate, there would be sufficient loss to the Government exchequer with respect to packages 90, 91 and 98. The learned single Judge found that there would be a difference of Rs.8,48,00,000/- between L1 (petitioner) and L2 and Rs.62,23,00,000/- between L1 (petitioner) and L3 with respect to package 90, the difference between L1 (petitioner) L2 would be Rs.7,20,00,000/- and Rs.15,15,00,000/- between L1 (petitioner) and L3 in respect of package 91 and it would be Rs.2,09,99,997/- between L1 (petitioner) and L2 and Rs.3,17,00,097/- between L1 (petitioner) and L3 in respect of package 98. The learned single Judge found that if the works of all these three packages were allotted to L2, the total difference would be Rs.17,77,99,997/-, therefore he ordered for fresh tender.

The companies-L2 and L3 who got affected by the order of learned single Judge filed petitions seeking leave to file appeals and they have filed WA Nos. 1390 and 1395 of 2005. All the three writ appeals are being disposed of together.

We have heard the learned counsel for the parties at length. The controversy is very short. Counter-affidavit was filed by 2nd respondent-Engineer-in-Chief in the writ petition. Most of the facts are not in dispute and have almost been accepted. Coming to the writ petition itself, certain facts have been admitted by the petitioner himself in his affidavit as well. The petitioner submitted that the petitioner concern i.e., M/s. GVPR Engineers Ltd. signed a joint venture agreement with M/s. Megha Engineering Enterprises for the purpose of submitting an application for pre-qualification pursuant to

the tender notice No.2, dt. 13.8.2004. The joint venture authorized the petitioner and petitioner's company to sign the pre-qualification documents and the documents submitted by them were accepted. By G.O.Ms.No. 727, Irrigation & C.A.D. (PPMU) Department, dt. 24.9.2004, 46 companies were empanelled and the petitioner's joint venture was shown at Sl.No. 21 in the list. By a subsequent G.O.Rt.No. 958, dt. 28.12.2004, 19 other companies were empanelled. The joint venture, by a letter dt. 27.1.2005, informed the 2nd respondent that the petitioner had been authorized by the joint venture to sign and submit the tender documents pertaining to packages 1 to 109 except 59, 60, 61 and 97. Accordingly the petitioner filed the tender papers along with bank guarantees on 15.2.2005 for packages 90, 91 and 98. The tenders in respect of packages 90 and 91 were opened on 19.2.2005 and the petitioner was L1 in respect of these packages and according to the petitioner, the difference of quoted value between the petitioner (L1) and another person L2 was Rs.8.48 crores for package 90 and Rs.7.20 crore for package 91. The 2nd respondent, according to the petitioner, accepted his bids for packages 90 and 91 and forwarded them for approval to the Tender Evaluation Committee constituted by the Government. In the meantime, the MEE, the subsidiary partner of the petitioner's joint venture, gave a letter dt. 21.2.2005 to the Government and Chief Engineer informing them that he had come to know that GVPREL had been recommended for black listing for some works. Though this information was false, but he also informed them that he had decided to withdraw from the joint venture and requested the Government that the bids submitted by the joint venture be not considered. MEE did not inform this to GVPREL. The joint venture agreement and the GPA have not been revoked and they were still in force and there is no dispute raised for resolution by arbitration. Thereafter, it appears that Ex-Officio Adviser (Irrigation) sent a memo dt. 28.4.2005 to G.S.P.Veera Reddy, Managing Director of M/s. GVPR Engineers and P.R. Krishna Reddy, CEO of Megha Engineering Enterprises informing that the joint venture is no more a joint venture and in order to establish that the joint venture had not

ceased, he gave them opportunity to appear before the Evaluation Committee on 4.5.2005. He also informed them that if any partner is absent, it would be construed that the joint venture had ceased to exist and action would be initiated to forfeit the EMD. The petitioner submitted that he attended the meeting on 5.5.2005 as it could not be held on 4.5.2005 and explained in detail both factual and legal issues involved in the case and submitted to the Government that a partner in joint venture could not withdraw and it would not have any effect on the tenders submitted by the GPA of the joint venture and the differences, if any, between the partners of joint venture would have to be resolved by way of arbitration. He also gave a representation to the advisor who presided over the meeting. The petitioner contended that they have not received any communication from the respondents. However, from the news item published in Eenadu Telugu daily dt. 6.5.2005 and Andhra Jyoti Telugu Daily dt. 16.5.2005 they came to know that the Government was trying to choose the companies-L2 and L3 for awarding the works.

In the counter-affidavit filed by the respondents, the main thrust of the contention was that GVPREL & M/s. MEE had formed into a joint venture and had tendered for the work as GVPREL & M/s. MEE-JV. Therefore, their offer was taken an offer by the joint venture and since one of the parties to the joint venture i.e., MEE had withdrawn, therefore there is no existing offer from the said company. Whether MEE was justified in walking out of the joint venture or not is a matter between GVPREL & M/s. MEE, but as far as the Government is concerned, the joint venture had ceased to exist, therefore the tender submitted by the joint venture had become non-existent.

In the light of these pleadings, the question is short as to whether if one of the parties to the joint venture informed the Government that they had withdrawn from the joint venture, could the Government still allot the work to the joint venture as they had offered less rates for packages 90, 91 and 98. The contention of the learned counsel for the writ petitioner was that after withdrawal of MEE from the joint venture, the entity of the joint venture as such does not

become non-existent and the respondents committed illegality in coming to the conclusion that the joint venture was not existing and the joint venture was only entitled to get the work as it was the lowest tenderer. The learned Advocate General, on the other hand, submits that the tender had been submitted by a concern of which MEE was a party and since the MEE had withdrawn, there was no tender by the concern before the Government. He also submits that there is a dispute between GVPREL & M/s. MEE and therefore the Government would have been ill-advised, had it allotted the work to the writ petitioner which would invite trouble for itself. Both of the firms would be fighting for the rights and liabilities and since the tender documents had been submitted by GVPREL & M/s. MEE-JV and before allotment, MEE had withdrawn, the liabilities could neither be fastened on the joint venture nor on the individual venture of GVPREL. As far as the Government was concerned, the joint venture was not existent, liability could not be passed on to the MEE as it had withdrawn before allotment of work, GVPREL which wants the works to be allotted had not alone tendered. The learned single Judge had taken note of the submissions made by the parties, particularly the test laid down for judicial review in *Goldstone Exports Limited Vs. Government of A.P.* and also in *Godavari Polymers Pvt. Ltd. Vs. Agricultural Products Commissioner & Principal Secretary* . In these judgments, after referring to the case law, the Court has laid down certain principles and all the 14 principles have been reproduced by the learned single Judge in his judgment. We need not discuss those principles, but it may be stated that tender conditions have to be strictly complied with, be it at the pre-qualification stage or at the stage of consideration of bids. On the question of joint venture and its liability, the learned single Judge also referred to number of judgments, but it will be suffice to refer to a judgment of the Supreme Court reported in *New Horizons Limited Vs. Union of India* wherein it was held,

“The expression “joint venture” is more frequently

used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses, (Black's Law Dictionary, 6th Edn., page 839). According to Words and phrases, Permanent Edn., a joint venture is an association of two or more persons to carry out a single business enterprise for profit (p.117. Vol.23). A joint venture can take the form of a corporation wherein two or more persons or companies may joint together. A joint venture corporation has been defined as a corporation which has joined with other individuals or corporations within the corporate framework in some specific undertaking commonly found in oil, chemicals, electronic, atomic fields, (Black's Law Dictionary, 6th Edn., p.342) Joint venture companies are now being increasingly formed in relation to projects requiring inflow of foreign capital or technical expertise in the fast developing countries in East Asia, viz. Japan, South Korea, Taiwan, China etc. (See Jacques Buhard; Joint Ventures in East Asia – Legal Issues (1991) there has been similar growth of joint ventures in our country wherein foreign companies join with Indian counterparts and contribute towards capital and technical know-how for the success of the venture."

By reading this judgment and the judgments to which a reference has been made by the learned single Judge and also the definitions which have been taken out by the learned single Judge, it may be stated that an informal partnership between two or more persons to take up a joint enterprise is a joint venture. The joint venture can be time bound, can be work specific and it would involve partners' contribution of finances, knowledge, technical know-how, mutual control of management, expectation of profit, sharing of profit. The learned counsel appearing for the writ petitioner submits that even if the joint venture was taken to be non-existent, the bid could

have been considered as a bid from GVPREL. But the facts reveal that GVPREL, as an individual bidder, was not having annual turn over of Rs.50 crores for the year financial year 2002-2003, there was a shortfall of Rs.1,678.64 lakhs for that year taking into consideration the annual turnover updated value of Rs.3,321.36 lakhs. Therefore, in our view, the joint venture was not in existence and GVPREL had not tendered for the works in its individual capacity and was not even eligible financially for allotment of the work. For these reasons, we do not find there is any ground for us to interfere in the judgment of the learned single Judge.

Coming to the second aspect, i.e., Retendering ordered by the learned single Judge, of which the other bidders are aggrieved and who have filed appeals, the learned single Judge found that there would be a difference of Rs. 17,77,99,997/- between the first bid and second bid with respect to three packages 90, 91 and 98. This is disputed by the parties and also the Government. They contend that the difference is not Rs. 17,77,99,997/-. The tenders were invited on 8.1.2005, more than a year has passed. We do not know about the escalation of price during one year. We do not have also expertise to know whether it would be profitable to allot the work to L2 and L3 companies or to re-tender the work. The learned single Judge has compared the rates of L1 on one side and L2 and L3 on the other and has come to the conclusion that there was a difference of Rs. 17,77,99,997/-. Even if it is taken to be correct, we cannot be sure if new tenders are called, whether the Government would be able to get offers which are less than the offers made by L2 and L3. The offers can be for less value; the offers can be for more value. This Court does not have expertise to come to a conclusion that it would be safe and beneficial for the State to re-tender the work. Therefore we leave this issue to be decided by the competent authority itself as the competent authority, in our view, is qualified and has also inputs to come to a right conclusion.

For these reasons, the direction for re-tendering of the work given by the learned single Judge is set aside and the matter is left to

the discretion of the Government. They shall be at liberty to grant the tender to L2 and L3 whoever is eligible or re-tender the work, if they find it to be beneficial for the State. The writ appeals are accordingly partly allowed. No costs.

Dt. 28.1.2006 _____

BILAL NAZKI J.

_____

K.C.BHANU J.

NB:

LR copies to be marked.

/BO/

KR